Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

JAMES A. MCDERMOTT,

Petitioner,

v.

JOHN A. BOEHNER,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

FRANK CICERO, JR., P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
EDWIN JOHN U
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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QUESTIONS PRESENTED

1. Whether the D.C. Circuit flouted this Court's decision in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), by applying the federal wiretapping statute, 18 U.S.C. § 2511(1)(c), to punish a disclosure of truthful information on a matter of public concern by someone not involved in unlawful wiretapping.

2. Whether the D.C. Circuit violated the separation of powers by punishing a Member of Congress under the federal wiretapping statute based on an alleged violation of an internal rule of the U.S. House of Representatives.

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INTRODUCTION

Over six years ago, this Court held that the federal wiretapping statute violates the First Amendment as applied to punish the disclosure of truthful information on a matter of public concern by someone not involved in unlawful wiretapping. *See Bartnicki v. Vopper*, 532 U.S. 514 (2001). That holding not only resolved an "important question" under the First Amendment, *id.* at 517, but also "resolve[d] the conflict" between the Third Circuit's decision in that case and the D.C. Circuit's prior decision in this case, *id.* at 522. The *Bartnicki* Court endorsed the Third Circuit's approach, and accordingly affirmed the Third Circuit's judgment, *see id.* at 535, while granting the petition for certiorari in this case, vacating the D.C. Circuit's judgment, and remanding this case for further proceedings, *see McDermott v. Boehner*, 532 U.S. 1050 (2001).

By a 5-4 vote, the *en banc* D.C. Circuit has now blasted a gaping hole into *Bartnicki*. According to the majority, *Bartnicki*'s First Amendment limitations on the federal wiretapping statute's nondisclosure duty magically vanish when that statute is invoked against someone who has violated some *other* nondisclosure duty. Because Rep. McDermott supposedly violated a nondisclosure duty imposed by the Ethics Committee of the U.S. House of Representatives, the D.C. Circuit majority declared, he constitutionally may be punished for violating the federal wiretapping statute's nondisclosure duty notwithstanding *Bartnicki*.

That conclusion, as Judge Sentelle explained in dissent, is a *non sequitur*. Whether Rep. McDermott violated a nondisclosure duty to the House Ethics Committee and whether he constitutionally may be punished for any such violation has nothing to do with whether Rep. McDermott violated the nondisclosure duty in the federal wiretapping statute and whether he constitutionally may be punished for any such violation.

This case, after all, arises under the federal wiretapping statute, not the House Ethics Committee Rules. Thus, as Judge Sentelle put it, "[w]e are reviewing a case governed by *Bartnicki*, and *Bartnicki*'s holding should prevail." App. 28a.

Indeed, the D.C. Circuit majority's attempt to avoid *Bartnicki* led that court into even deeper constitutional error. The alternative duty invoked by the D.C. Circuit as the basis for sidestepping *Bartnicki* is not just *any* nondisclosure duty: it is an internal nondisclosure duty imposed by the Legislative Branch of the Federal Government upon its own Members. Under bedrock separation of powers principles, the Judicial Branch is not in the business of adjudicating—much less punishing—violations of the internal rules of the Legislative Branch. And that point is particularly compelling here, given that the House Ethics Committee itself decided that Rep. McDermott's alleged violation of its internal rules did *not* warrant punishment, and declined even to refer the matter to a special subcommittee responsible for adjudicating violations of Ethics Committee rules. By concluding that Rep. McDermott could be punished under the federal wiretapping statute based solely on his supposed violation of an internal House rule, the D.C. Circuit majority transgressed its constitutional authority and intruded into the legislative sphere.

The sharply divided *en banc* decision below thus flouts the authority not only of this Court, by evading *Bartnicki*, but also of Congress, by adjudicating a violation of an internal House rule. And the irony is that only a single judge on the D.C. Circuit thought that the House Rules should be dispositive here. Four of the nine judges below thought that *Bartnicki* governed this case, and required judgment in Rep. McDermott's favor, *see* App. 15-30a (Sentelle, J., dissenting), while four other judges thought that *Bartnicki* did not apply here in the first place, *see id.* at 7a n.1. Only Judge Griffith thought that *Bartnicki* applied here but that Rep. McDermott nonetheless may

be punished, and Judge Griffith cast the deciding vote. *See id.* at 14a (concurring opinion). That is no way to leave the law on such important constitutional issues. Indeed, the fact that the D.C. Circuit was so deeply divided as to produce two rival majorities in this case (after no fewer than five rounds of briefing and argument, including two separate *en banc* arguments) only underscores that this Court's review is warranted. Accordingly, this Court should once again grant certiorari in this case, and reaffirm that *Bartnicki* means what it says.

OPINIONS BELOW

The D.C. Circuit's *en banc* decision is reported at 484 F.3d 573 and reprinted in the Appendix ("App.") at 1-30a. The D.C. Circuit's unpublished order calling for supplemental *en banc* briefing and argument is reprinted at App. 31-32a. The D.C. Circuit's unpublished order granting *en banc* review is reprinted at App. 33-34a. The D.C. Circuit's prior panel decision is reported at 441 F.3d 1010 and reprinted at App. 35-56a. The district court's decision granting respondents' motion for summary judgment on liability is reported at 332 F. Supp. 2d 149 and reprinted at App. 57-92a. The district court's unpublished order memorializing that decision is reprinted at App. 93a. The district court's unpublished order on damages is reprinted at App. 94-112a.

JURISDICTION

The D.C. Circuit rendered its *en banc* decision on May 1, 2007. App. 1a. On July 24, 2007, Justice Stevens granted petitioner's application to extend the time within which to file a petition for a writ of certiorari to September 28, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE

The following constitutional and statutory provisions and rule are pertinent to this case:

The First Amendment to the Constitution provides in relevant part that "Congress shall make no law ... abridging the freedom of speech, or of the press ...." U.S. Const. amend. I.

The Rulemaking Clause of the Constitution provides in relevant part that "Each House may determine the Rules of its Proceedings [and] punish its Members for disorderly Behaviour." U.S. Const. Art. I, § 5, cl. 2.

The federal wiretapping statute provides in relevant part:

> Except as otherwise specifically provided in this chapter any person who—
>
> (a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;
>
> (b) intentionally uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication ....
>
> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through

> the interception of a wire, oral, or electronic communication in violation of this subsection; ....
>
> shall be punished ....

18 U.S.C. § 2511;

> Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity, other than the United States, which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a).

Rule 9 of the House Ethics Committee, at the time relevant here, provided that "Committee members and staff shall not disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee."

Rule 9, Committee on Standards of Official Conduct, U.S. House of Representatives, 104th Congress (1995-96).

STATEMENT OF THE CASE

A. Background

This case arises out of a conference call held by then-Speaker of the U.S. House of Representatives Newt Gingrich and several of his political allies on December 21, 1996, to prepare a response to an Ethics Committee investigation into alleged improprieties. *See* App. 3a.[1] Respondent John Boehner, a Member of Congress from

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[1] Because this appeal arises from the grant of a motion for summary judgment in respondent's favor, all factual inferences must be drawn in petitioner's favor. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

Ohio, participated in that call in his capacity as Chairman of the House Republican Conference, *see id.*, the fourth-ranking position in the House Republican leadership. Rep. Boehner, who was then visiting Florida, used a cellular telephone to participate in the call. *Id.*

A Florida couple, John and Alice Martin, heard the call over a radio scanner and taped it. *Id.* Several weeks later, on January 8, 1997, the Martins traveled to Washington, D.C., and went to the House of Representatives. *Id.* In a public anteroom of the House Ethics Committee, they approached petitioner James McDermott (a Member of Congress from Washington, and then the Ranking Democrat on the House Ethics Committee), introduced themselves, and handed him an envelope. App. 4a; *see also* Dep. of Rep. James A. McDermott ("McDermott Dep."), C.A. App. 73-74. The Martins told Rep. McDermott that the envelope contained a tape that would be of interest to him, and asked him to listen to it. *Id.* Rep. McDermott said that he would. *Id.*

Before that encounter, neither Rep. McDermott, nor his staff, nor anyone acting on his behalf had any knowledge of the Martins or the tape. *See* Decl. of James A. McDermott ("McDermott Decl."), C.A. App. 199. Rep. McDermott had never met the Martins, did not know who they were, and did not know why they wanted to meet him. *See* McDermott Dep., C.A. App. 77; McDermott Decl., C.A. App. 199. When the Martins handed Rep. McDermott the envelope and said that it contained a tape, they did not tell him what was on the tape or why they were giving it to him. McDermott Dep., C.A. App. 74, 78, *see also* McDermott Decl., C.A. App. 199.

Accordingly, Rep. McDermott had no idea what was on the tape when he accepted the envelope from the Martins. "I knew nothing about that tape when it was handed to me. Nothing." McDermott Dep., C.A. App. 79; *see also id.* at 79-80 ("I didn't know anything about where [the tape] came from. I didn't know that they had done it.

They brought me a tape and said they thought I'd be interested in it or should listen to it. And that's all I knew. I didn't know anything else."); *id.* at 78 ("I had no knowledge of what was on the tape. I didn't have any reason to believe or to think or draw any conclusions."); McDermott Decl., C.A. App. 199 ("I had no idea what the tape contained when the Martins handed it to me, because they never discussed its contents with me."). As Rep. McDermott explained:

> In 30 years of being involved in public life you're often handed things by people, which you accept, put in your pocket, and move on. And that's precisely what I had here. I didn't know who these people were. I had no understanding of what they were doing. ...

McDermott Dep., C.A. App. 77. Neither Rep. McDermott, nor his staff, nor anyone acting on his behalf ever communicated with the Martins after that single brief encounter. *See* McDermott Decl., C.A. App. 200.

Although the Martins had prepared a transmittal letter stating that the envelope contained the tape of a conversation heard over a radio scanner, Rep. McDermott did not read any such letter during his brief encounter with them. Rather, as he testified without contradiction, the Martins simply handed him an 8-1/2" by 11" envelope and told him that it contained a tape that he would find interesting. *See* McDermott Dep., C.A. App. 73-74. Indeed, Rep. McDermott testified that he does not recall even *seeing* the transmittal letter during his encounter with the Martins. *See, e.g., id.* at 72 ("Q. Okay. And just so I'm clear, you can't remember seeing it on January 8th, when you met with the Martins, correct? A. Yes.").

Several hours later, after Rep. McDermott returned to his office, he opened the envelope the Martins had handed to him, turned it over, and shook out a tape cassette. *See id.* at 75. When he listened to the tape, Rep. McDermott recognized some of the voices on it, including then-

Speaker Gingrich's voice. *See id.* at 79. From the tape, Rep. McDermott learned for the first time that, as part of a settlement of ethics charges against him, the Speaker had agreed not to participate in any efforts to spin the settlement agreement in a favorable light. *See id.* at 37, 42. Rep. McDermott believed that the tape—in which the Speaker and his political allies discussed how to orchestrate a spin campaign in apparent violation of that agreement—had obvious importance to the public. *See id.* at 36, 49.

Rep. McDermott then called two reporters, Adam Clymer of *The New York Times* and Jeanne Cummings of *The Atlanta Journal-Constitution*, and invited them separately to his office. *See id.* at 80, 82. He gave each reporter an opportunity to listen to the tape. *See id.* at 81-82.

On Friday, January 10, 1997, *The New York Times* ran a front-page article describing the recorded conversation. The article explained that the conversation included a strategy session about how "to limit political fallout" from the Gingrich ethics investigation, in apparent violation of the agreement between the Speaker and the Ethics Committee. The article also included excerpts from the tape. Similar stories later ran in *The Atlanta Journal-Constitution* and *Roll Call*. None of these articles mentioned Rep. Boehner.

The U.S. Department of Justice thereafter launched a criminal investigation into the interception and disclosure of the tape. On April 23, 1997, the Martins were charged with the unlawful interception of a cellular telephone call, in violation of 18 U.S.C. §§ 2511(1)(a), 2511(4)(b)(ii). *See* U.S. Department of Justice Press Release, *Martins Charged in Cell Phone Case*, Apr. 23, 1997, C.A. App. 20-21. As the Justice Department explained, "[b]ecause the interception involved the radio portion of a cellular telephone communication, and because there is no evidence that the interception was for a tortious or illegal

purpose or for purposes of direct or indirect commercial advantage or private financial gain, the U.S. Code classifies this offense as an infraction." *Id.* Each of the Martins pleaded guilty, and was fined $500. *See* U.S. Department of Justice Press Release, *Martins Plead Guilty and Are Sentenced in Cell Phone Case*, Apr. 25, 1997, C.A. App. 22. The United States did not charge the Martins with the unlawful disclosure (as opposed to interception) of the communication, and never brought any charges against Rep. McDermott, *The New York Times*, or any other person or entity.

B. Procedural History

1. Round One

Rep. Boehner filed this lawsuit in March 1998, charging Rep. McDermott with the disclosure of an unlawfully intercepted communication in violation of the federal wiretapping statute, 18 U.S.C. §§ 2511(1)(c), 2520. The complaint did not name the Martins or any media outlet as a defendant, did not allege that Rep. Boehner had suffered any injury from the disclosure, and did not seek compensatory damages.

In July 1998, the district court (Hogan, J.) dismissed the complaint on the ground that the application of the federal wiretapping statute to this case would violate the First Amendment by punishing the disclosure of truthful and lawfully obtained information on a matter of public importance. *See Boehner v. McDermott*, No. CIV. 98-594, 1998 WL 436897 (D.D.C. July 28, 1998). In so doing, the court relied on a line of this Court's cases holding that the First Amendment forbids the government from punishing the disclosure of truthful and lawfully obtained information absent a need to further a governmental interest of the highest order. *Id.* at *5 (citing, *inter alia*, *Florida Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979)).

Rep. Boehner appealed, and the United States intervened to support the constitutionality of the federal statute as sought to be applied here. A fractured panel of the D.C. Circuit reversed. *See Boehner v. McDermott*, 191 F.3d 463 (D.C. Cir. 1999). Judge Randolph, writing for himself, concluded that this case did not involve speech at all, but only conduct. *See id.* at 466-67 (opinion of Randolph, J.). Both Judge Randolph and now-Chief Judge Ginsburg also concluded that Rep. McDermott had not "lawfully obtained" the information even though he broke no law by receiving it. *Id.* at 475-76 (opinion of Randolph, J.); 479-80 (opinion of Ginsburg, J.). Because it was unlawful for the Martins to disclose the tape, under this view, Rep. McDermott participated in an "illegal transaction" by receiving the tape from them. *Id.* Judge Sentelle dissented from the panel's decision, *see id.* at 480-86, and both Judges Sentelle and Tatel dissented from the denial of rehearing *en banc*.

Rep. McDermott and the plaintiffs in a similar case from the Third Circuit, *Bartnicki v. Vopper*, 200 F.3d 109 (3d Cir. 1999), filed petitions for certiorari in this Court at about the same time. This Court granted certiorari in *Bartnicki* "to resolve the conflict" between the Third Circuit's decision in that case and the D.C. Circuit's decision in this case on an "important" issue of First Amendment law. *See* 532 U.S. at 517, 522.

This Court ultimately affirmed the Third Circuit's decision in *Bartnicki*, declaring that "we are firmly convinced that the disclosures made by respondents in this suit are protected by the First Amendment." *Id.* at 518. The Court specifically "accept[ed] petitioners' submission that the interception was intentional, and therefore unlawful, and that, at a minimum, respondents 'had reason to know' that it was unlawful." *Id.* at 525. Even though the *Bartnicki* respondents were deemed to have satisfied the statutory *scienter* requirement, the Court held that "it would be quite remarkable to hold that speech by a law-abiding possessor of information can be

suppressed in order to deter conduct by a non-law-abiding third party." *Id.* at 529-30. Thus, because the *Bartnicki* respondents "played no part in the illegal interception," the First Amendment did not allow them to be punished for disclosing that information *regardless* of their knowledge of illegal conduct by others. *Id.* at 525.

The Court then granted Rep. McDermott's petition for certiorari, vacated the D.C. Circuit's judgment, and remanded this case. *See McDermott v. Boehner*, 532 U.S. 1050 (2001). Consistent with its representation to this Court that "*Bartnicki* is indistinguishable from this case," Br. for United States at 15, *McDermott v. Boehner* (U.S. No. 99-1709) (internal quotation omitted), the United States (which had defended the constitutionality of the statute through briefing and argument in both this case and *Bartnicki*) declined to participate on remand. After a new round of briefing and oral argument, the D.C. Circuit *sua sponte* remanded the case to the district court for Rep. Boehner to amend his complaint in light of *Bartnicki*. *See Boehner v. McDermott*, No. 98-7156, 2001 WL 1699420 (D.C. Cir. Dec. 21, 2001) (*per curiam*).

2. Round Two

Rep. Boehner's amended complaint asserted the same claims as the original complaint, *see* Am. Compl., C.A. App. 10-19, and discovery established that Rep. Boehner could not avoid *Bartnicki* by proving that Rep. McDermott was involved in any way in the Martins' unlawful interception of a protected communication.

Notwithstanding *Bartnicki*, however, the district court invoked the "residual authority" of the D.C. Circuit's vacated decision, App. 68a, and granted Rep. Boehner's motion for summary judgment, *see* App. 57-92a. Even though *Bartnicki* expressly assumed that the defendants there knew or had reason to know that the tape had been unlawfully intercepted, the district court purported to distinguish *Bartnicki* on the ground that Rep. McDermott knew or had reason to know that the tape had been

unlawfully intercepted. In particular, the court drew a dispositive distinction between knowledge at the time of *receipt* versus knowledge at the time of *disclosure*. App. 80-84a, 90-91a. The court then concluded that there was no genuine issue of material fact as to Rep. McDermott's knowledge of the Martins' unlawful conduct at the time he received the tape from them, despite his sworn testimony to the contrary. App. 84-90a.

After granting summary judgment in Rep. Boehner's favor on liability, the district court ordered Rep. McDermott to pay statutory damages of $10,000, punitive damages of $50,000, and attorneys' fees and costs. App. 94-112a. Although the court has not yet calculated such fees and costs, Rep. Boehner has most recently estimated them at approximately $880,000.

Rep. McDermott appealed. Over Judge Sentelle's dissent, the previous panel assigned the case to itself, and—by a 2-1 vote—affirmed the grant of summary judgment in Rep. Boehner's favor. *See* App. 35-56a. The majority opinion (authored by Judge Randolph) concluded that *Bartnicki* does not apply to "a person who knowingly receives a tape from an illegal interceptor." App. 42a. The majority then held that the undisputed evidence here established that Rep. McDermott either knew or had reason to know the tape had been unlawfully intercepted when he received it. App. 42-45a. Judge Sentelle again dissented, noting that *Bartnicki* "decided the very issue of this case," and dismissing the majority's attempted distinction of *Bartnicki* as "artificial." App. 53a (dissenting opinion).

Upon Rep. McDermott's motion, the D.C. Circuit then granted *en banc* review. App. 33-34a. At the *en banc* oral argument, Rep. Boehner not only endorsed the panel majority's distinction of *Bartnicki*, but pressed an alternative theory under *United States v. Aguilar*, 515 U.S. 593 (1995). According to Rep. Boehner, that case stands for the proposition that nondisclosure duties may

be imposed on "[p]eople who are in sensitive confidential positions," even if those duties could not be imposed on unwilling members of the general public. C.A. Tr. Oral Arg. (10/31/06), at 41. Rep. Boehner argued Rep. McDermott was in such a position at the time of his disclosure by virtue of his membership on the House Ethics Committee, and thus could be punished notwithstanding *Bartnicki*. *See id.* On December 5, 2006, the *en banc* D.C. Circuit *sua sponte* issued an order requesting supplemental briefing and argument "limited to the issue whether *United States v. Aguilar*, 515 U.S. 593 (1995), limits First Amendment protection of McDermott's disclosure." App. 32a.

The very next day, the Investigative Subcommittee of the House Ethics Committee, which had been reviewing an ethics complaint filed against Rep. McDermott in November 2004 by Rep. David Hobson based upon the disclosure at issue in this lawsuit, issued a Report to the Ethics Committee. App. 113-45a. Under the Ethics Committee Rules, an Investigative Subcommittee determines whether "there is substantial reason to believe that a violation of the Code of Official Conduct, or of a law, rule, regulation, or other standard of conduct ... has occurred." Rule 19(f), Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress (2005-06). If so, the Investigative Subcommittee issues a "Statement of Alleged Violation" (essentially an indictment), and the matter proceeds to an Adjudicatory Subcommittee, which "holds an adjudicatory hearing and determines whether the counts in a Statement of Alleged Violation are proved by clear and convincing evidence." Rule 2(f), Committee on Standards of Official Conduct, U.S. House of Representatives, 109th Congress (2005-06).

Here, the Investigative Subcommittee did not adopt any Statement of Alleged Violation regarding Rep. McDermott, and thus did not charge him with having violated any law, rule, regulation, or other standard of conduct (or give him a chance to defend himself against

any such charge before the Adjudicatory Subcommittee). Rather, the Report stated *only that* "Representative McDermott's conduct, *i.e.*, his disclosure to the news media of the contents of the tape furnished to him by the Martins, was inconsistent with the *spirit* of the applicable rules and represented a failure on his part to meet his *obligations as Ranking Minority Member* of the House Select Committee on Ethics." App. 142a (emphasis added). The Investigative Subcommittee simply sent its Report to the full Ethics Committee, noting that it had "decided against further proceedings in this matter," and "additionally recommends that the Report of the Investigative Subcommittee be released to the public with no further statement by the Committee beyond announcing release of this Report." App. 145a. The full Ethics Committee adopted the Report on December 8, 2006, and publicly released it on December 11, 2006. App. 113a, 146a.

After the parties to this lawsuit filed supplemental briefs and the *en banc* D.C. Circuit heard a second oral argument, the court rendered a splintered decision. A 5-4 majority agreed with Rep. McDermott that *Bartnicki* applied here because Rep. McDermott had lawfully obtained the tape, even though the Martins had not. *Compare* App. 17-24a *with* App. 7a n.1. But then a different 5-4 majority held that Rep. McDermott had violated a nondisclosure duty in the House Rules, and hence could be punished for violating the nondisclosure duty in the federal wiretapping statute notwithstanding *Bartnicki*. *Compare* App. 7-13a *with* 24-30a. Judge Griffith provided the swing vote. *See* App. 14a.

This petition follows.

REASONS FOR GRANTING THE WRIT

I. The D.C. Circuit Flouted *Bartnicki* By Applying The Federal Wiretapping Statute To Punish A Disclosure Of Truthful Information On A Matter Of Public Concern By Someone Not Involved In Unlawful Wiretapping.

The premise of our hierarchical judicial system is that "a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *Hutto v. Davis*, 454 U.S. 370, 375 (1982) (*per curiam*); *see also Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995) ("We would have thought it self-evident that the lower courts must adhere to our precedents."). The decision below, whether "consciously or unconsciously," calls that premise into question, and thereby threatens "the hierarchy of the federal court system created by the Constitution and Congress." *Hutto*, 454 U.S. at 375.

This Court held in *Bartnicki* that the federal wiretapping statute violates the First Amendment as applied to punish a disclosure of truthful information on a matter of public concern by someone not involved in unlawful wiretapping—even if the person knew or had reason to know that the information had been unlawfully intercepted by someone else. 532 U.S. at 525-35; *see also* App. 17-24a; *Jean v. Massachusetts State Police*, 492 F.3d 24, 32 (1st Cir. 2007). That holding should have been the beginning and the end of this case. Rep. McDermott, like the respondents in *Bartnicki*, was sued under the nondisclosure provision of the federal wiretapping statute for disclosing truthful information on a matter of public concern. And, again as in *Bartnicki*, there was no evidence here of any involvement in the underlying interception.

Nonetheless, a 5-4 majority of the *en banc* D.C. Circuit purported to distinguish *Bartnicki* on the ground that Rep. McDermott violated a duty of nondisclosure under

the House Ethics Committee Rules. App. 7-13a. But that is a classic distinction without a difference. This case is not about the duty of nondisclosure under the House Ethics Committee Rules. No one here is trying to punish Rep. McDermott under the House Ethics Committee Rules (and the House itself tellingly declined to do so). Rather, this case is about the duty of nondisclosure in the federal wiretapping statute, 18 U.S.C. § 2511(1)(c). Rep. Boehner is trying to punish Rep. McDermott for violating the duty of nondisclosure in that criminal statute. *See* App. 28a (Sentelle, J., dissenting) ("[W]e are charged with determining the constitutionality of applying § 2511 in circumstances directly paralleling those considered by the Supreme Court in *Bartnicki*.").

Indeed, in his original pre-*Bartnicki* decision in this case, Judge Randolph, author of the *en banc* majority opinion below, was utterly explicit on this point. He emphasized that "McDermott ... obtained the tape under a duty of nondisclosure. In his case the duty arose from a statute—§ 2511(1)(c)." *Boehner v. McDermott*, 191 F.3d at 477 (opinion of Randolph, J.); *see also id.* at 478 ("[McDermott] had a duty ... of nondisclosure. The duty stemmed of course from every citizen's responsibility to obey the law, of which § 2511(1)(c) is a part.") (opinion of Randolph, J.).

It is no answer to say, after this Court declared the nondisclosure duty in § 2511(1)(c) unconstitutional as applied to persons who (like Rep. McDermott) were not involved in unlawful wiretapping, that this case is now about a different duty after all. Legal duties are not interchangeable at will. If, as *Bartnicki* establishes, the nondisclosure duty in § 2511(1)(c) is unconstitutional as applied to persons not involved in an unlawful interception, this case is over. The constitutionality of *that* nondisclosure duty as applied here cannot possibly turn on the constitutionality of some *other* nondisclosure duty as applied here, because no other nondisclosure duty is being applied here.

The majority below thus erred by asserting that "[i]f the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit." App. 11a; *see also id.* ("Either he had a First Amendment right to disclose the tape to the media or he did not."). Under this approach, if Rep. McDermott violated a nondisclosure duty under the House Ethics Committee Rules, he constitutionally may be punished for violating any *other* nondisclosure duty. That "mix and match" approach has no basis in law, and hence provides no plausible ground for avoiding *Bartnicki*.

Constitutional rights, after all, do not exist in a vacuum. Thus, the fact that particular speech may be punished under *some* law without violating the First Amendment does not mean that the speech may be punished under *any* law without violating the First Amendment. *See, e.g., R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382-90 (1992) ("fighting words" that generally may be punished without violating the First Amendment may not be punished under statute discriminating between different categories of "fighting words"). To the contrary, it is a commonplace of First Amendment law that certain restrictions may violate free speech rights, even if other restrictions would not violate those same rights. *See, e.g., City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418-31 (1993) (invalidating municipal ordinance limiting speech because of the way it was written without foreclosing possibility that properly written ordinance could limit the speech); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 129-37 (1992) (same). The First Amendment, in other words, does not cease to protect particular speech in *all* circumstances just because it may not protect that speech in *some* circumstances.

The D.C. Circuit's view that "[e]ither [Rep. McDermott] had a First Amendment right to [speak] or he did not," App. 11a, however, means that the First

Amendment does not protect the speech at issue here precisely because it may not protect that same speech everywhere. Under this view, as long as Rep. McDermott constitutionally may be punished for violating a nondisclosure duty under the House Rules, he constitutionally may be punished for violating any *other* nondisclosure duty, even one that is otherwise unconstitutional—like the nondisclosure duty in § 2511(1)(c) as applied in *Bartnicki* and here, or, for example, a nondisclosure duty applicable only to disclosures embarrassing to Republicans but not Democrats. That is not, and never has been, the law. *See, e.g., R.A.V.*, 505 U.S. at 384 ("[T]he government may proscribe libel; but it may not make the further content discrimination of proscribing *only* libel critical of the government.") (emphasis in original).

In effect, the decision below collapses the distinction between facial and as-applied challenges under the First Amendment. If it were true that a First Amendment challenge to a particular limitation on speech fails if that speech constitutionally may be limited in *any* circumstance, then a party bringing an as-applied challenge to a limitation on speech would have to show that the limitation was unconstitutional in *all* circumstances, which is the very essence of a facial challenge. *See, e.g., United States v. Salerno*, 481 U.S. 739, 745 (1987). That is simply not the law. To the contrary, a party bringing an as-applied challenge needs only to show that a particular restriction is unconstitutional as applied to him, even if that restriction would not be unconstitutional as applied to someone else, or some other restriction would not be unconstitutional as applied to him. *See, e.g., Members of the City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 803 & n.22 (1984). Settled law thus recognizes that a particular restriction on speech may be unconstitutional as applied in particular circumstances, even if it is not unconstitutional on its face. "'The fact that a law is

capable of valid applications does not necessarily mean that it is valid as applied to these litigants.'" *FEC v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652, 2670 n.8 (2007) (quoting *Taxpayers for Vincent*, 466 U.S. at 803 n.22); *see also Wisconsin Right to Life, Inc. v. FEC*, 546 U.S. 410, 411-12 (2006) (*per curiam*); *McConnell v. FEC*, 540 U.S. 93, 157 n.52, 159, 173, 244 (2003).

Aguilar in no way conflicts with that settled law. Indeed, *Aguilar* is a statutory case that addressed the First Amendment only tangentially. *See* 515 U.S. at 602-05. There, a federal district judge notified the target of a federal criminal probe that his telephone was being wiretapped. *See id.* at 596. The judge was later convicted of violating a statute authorizing the punishment of anyone who, "having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization ... to intercept a wire, oral, or electronic communication, *in order to obstruct, impede, or prevent such interception*, gives notice or attempts to give notice of the possible interception to any person." 18 U.S.C. § 2232(c) (1994) (emphasis added). The judge challenged his conviction on the ground that the statute did not cover his disclosure, and invited this Court to construe the statute narrowly "because of a concern that a broader construction would run counter to the First Amendment." 515 U.S. at 605.

This Court rejected that invitation. The Court began its constitutional-avoidance analysis by acknowledging the principle that "the Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a 'state interest of the highest order.'" *Id.* (quoting *Daily Mail*, 443 U.S. at 103). That principle did not apply in *Aguilar*, the Court explained, because "the statute here in question does not impose such a restriction generally, but only upon those who disclose wiretap information 'in order to obstruct, impede, or prevent' the interception." *Id.* (quoting 18 U.S.C. § 2232(c)). *Aguilar* thus supports,

rather than undermines, the settled point that whether a particular nondisclosure duty passes First Amendment muster turns not on the existence of an abstract "First Amendment right to disclose" under any and all circumstances, App. 11a, but instead on the scope and context of the particular nondisclosure duty at issue.

To be sure, the *Aguilar* Court also observed that Judge Aguilar was not "simply a member of the general public who happened to lawfully acquire possession of information about the wiretap; he was a Federal District Court Judge who learned of a confidential wiretap application from the judge who had authorized the interception, and who wished to preserve the integrity of the court." 515 U.S. at 605-06. As the Court explained, "[g]overnment officials in sensitive confidential positions may have special duties of nondisclosure." *Id.* at 606 (citing Fed. R. Crim. P. 6(e) (prohibiting the disclosure of grand jury information)). "As to one who voluntarily assumed a duty of confidentiality, governmental restrictions on disclosure are not subject to the same stringent standards that would apply to efforts to impose restrictions on unwilling members of the public." *Id.* (citing *Snepp v. United States*, 444 U.S. 507 (1980) (*per curiam*)). But, as Judge Sentelle noted below, this is hardly an endorsement of the notion that a person subject to *one* valid nondisclosure duty may constitutionally be punished under *any* nondisclosure duty. Rather, "[t]he statute at issue in *Aguilar* was closely connected with the 'special duty of nondisclosure' that limited the defendant's First Amendment rights," whereas the nondisclosure duty in § 2511(c) "is unrelated to whatever 'special duty of nondisclosure' McDermott may have had as a member of Congress." App. 28a (Sentelle, J., dissenting). In short, "[i]t does not follow that Representative McDermott's violation of a House Committee rule deprives him of a First Amendment defense to every other nondisclosure law." *Id.*

Thus, whether Rep. McDermott constitutionally may be punished for violating a nondisclosure duty imposed by the House Ethics Committee does not answer the question whether Rep. McDermott constitutionally may be punished for violating the distinct nondisclosure duty imposed by the federal wiretapping statute. The former question is not presented by this case, and the latter question is answered by *Bartnicki*.

Once a 5-4 majority of the *en banc* D.C. Circuit concluded that *Bartnicki* applied here, *see* App. 17-24a, in other words, there was no basis for another 5-4 majority of the *en banc* D.C. Circuit to reject Rep. McDermott's First Amendment defense. The lower courts are obviously entitled to try to distinguish this Court's precedents, and in appropriate cases to reaffirm a judgment vacated and remanded by this Court, but not to avoid this Court's rulings based on insubstantial distinctions. *See, e.g.*, *Williams v. Planned Parenthood Shasta-Diablo, Inc.*, 520 U.S. 1133, 1136 (1997) (Scalia, J., joined by Kennedy and Thomas, JJ., dissenting from denial of certiorari) ("[W]e should in my view always be disposed to [carefully scrutinize lower court decisions] when the grounds are newly minted after a remand, contradict what was said before the remand, and bear indication of an attempt to evade the consequences of our holding prompting the remand," especially where "the abridgment of First Amendment rights [is] at issue."). That point is particularly compelling here, given that this Court granted certiorari in *Bartnicki* itself for the very purpose of "resolv[ing] the conflict" between the Third Circuit's decision in that case and the D.C. Circuit's initial decision in this case. 532 U.S. at 522.

If, as *Bartnicki* holds, § 2511(1)(c) violates the First Amendment as applied to punish the disclosure of truthful information on a matter of public concern by someone not involved in the underlying interception, *see* 532 U.S. at 525-35, a lower court may not avoid that constitutional holding by simply importing *another*

nondisclosure duty into a § 2511(1)(c) case. Thus, if Rep. McDermott may not constitutionally be punished for violating the nondisclosure duty in § 2511(c)(1), he may not constitutionally be punished under § 2511(c)(1). That proposition, which has the virtue of being both simple and true, disposes of this case. The result here should be no different depending on whether the defendant is Rep. McDermott, *The New York Times*, or anyone else.

Indeed, the implications of the D.C. Circuit's contrary approach are staggering. The *Bartnicki* Court thought it was deciding an "important question" of First Amendment law, 532 U.S. at 517, but the decision below threatens to turn the rule into the exception. The D.C. Circuit identified no limiting principle to its theory that the nondisclosure duty in § 2511(c)(1) may be enforced against persons otherwise protected by *Bartnicki* if they are subject to some *other* nondisclosure duty, and no such limitation is apparent. What other kinds of nondisclosure duties may be indirectly enforced via § 2511(1)(c)? Are they only legal duties, or also ethical and/or professional duties? If an employee violates a duty of confidentiality to his company by disclosing corporate misdeeds, does that mean not only that he may be fired, but also that he is stripped of any First Amendment defense to a subsequent libel action? The bottom line here is that the D.C. Circuit avoided *Bartnicki* only by embracing a radical and unfounded lowest-common-denominator approach to the First Amendment, so that now more than ever this case presents an "important question" of First Amendment law, *Bartnicki*, 532 U.S. at 517, worthy of this Court's review.

II. The D.C. Circuit Violated The Separation Of Powers By Punishing A Member Of Congress Under The Federal Wiretapping Statute Based On An Alleged Violation Of An Internal House Rule.

By straining to evade *Bartnicki*, moreover, the D.C. Circuit flouted not only this Court's authority over constitutional law, but also Congress' authority over its own internal discipline. Even if it were permissible as a general matter to salvage the constitutionality of the nondisclosure duty in § 2511(1)(c) by reference to some other nondisclosure duty, it is not permissible for the courts to enforce, directly or indirectly, an internal duty imposed by Congress upon its Members. To the contrary, the Rulemaking Clause of the Constitution expressly gives Congress the exclusive power to make and enforce its own internal disciplinary rules. *See* U.S. Const. Art. I, § 5, cl. 2. The D.C. Circuit's evasion of *Bartnicki* thus makes this not only an important First Amendment case, but also an important separation of powers case.

In particular, by concluding that Rep. McDermott violated a nondisclosure duty under the House Ethics Committee Rules, and attaching adverse collateral consequences to that conclusion, the D.C. Circuit violated the fundamental separation of powers that underlies our entire constitutional structure. It has long been established that Congress' power to make and enforce its own rules is "absolute and beyond the challenge of any other body or tribunal." *United States v. Ballin*, 144 U.S. 1, 5 (1892); *see also* 2 Joseph Story, *Commentaries on the Constitution of the United States* 298 (L. Levy ed., DaCapo Press 1970) (1833) ("If the power did not exist, it would be utterly impracticable to transact the business of the nation, either at all, or at least with decency, deliberation, and order."). The courts are not in the business of enforcing internal House rules, either directly or indirectly, or attaching adverse collateral consequences to internal legislative activity.

To the contrary, such judicial intrusion into the legislative sphere violates the separation of powers. *See, e.g., United States v. Eilberg*, 507 F. Supp. 267, 276 (E.D. Pa. 1980) (noting the Government's concession that "[e]nforcement of a purely internal House Rule by the executive and courts would be an encroachment on the powers of the House, a violation of the separation of powers, and a violation of the [Rulemaking] clause.") (internal quotation omitted). Congress should be free to discipline, or not to discipline, its own Members without concern that its resolution of internal disciplinary matters might trigger adverse collateral consequences from a potentially (or actually) hostile judiciary. *See, e.g., United States v. Johnson*, 383 U.S. 169, 180-81 (1966); *United States v. Helstoski*, 635 F.2d 200, 204-05 (3d Cir. 1980); *see also* App. 29a (Sentelle, J., dissenting) ("We must leave for the coordinate branch of government the interpretation of its own rules.").

That is not to say that courts may not enforce generally applicable laws governing particular *conduct* that also may be at issue in an internal legislative disciplinary proceeding. Certainly, the fact that Congress has chosen to investigate one of its own does not immunize the target of that investigation from generally applicable laws. *See, e.g., United States v. Rose*, 28 F.3d 181, 186-90 (D.C. Cir. 1994). But that is not what has happened in this case. Here, the D.C. Circuit expressly concluded that Rep. McDermott could not constitutionally be punished under § 2511(1)(c), *see* App. 17-24a; 14a (Griffith, J., concurring), *but for* the court's interpretation of an internal House rule, *see* App. 7-13a; 14a (Griffith, J., concurring).

For the courts to purport to interpret Congress' internal disciplinary rules, and to attach adverse collateral legal consequences to perceived violations of those rules, undermines not only legislative authority but also judicial independence. Lawsuits between legislators, like this one, "pose a real danger of misuse of the courts

by members of Congress whose actual dispute is with their fellow legislators." *Moore v. United States House of Reps.*, 733 F.2d 946, 956 (D.C. Cir. 1984). Rival factions in Congress may have sharply divergent views with respect to the scope, application, or validity of an internal rule. For the courts to become embroiled in such disputes, and hand victory to one faction over another, would represent "a perversion of the judicial process into a political process." *Davids v. Akers*, 549 F.2d 120, 124 (9th Cir. 1977); *see also Gregg v. Barrett*, 771 F.2d 539, 549 (D.C. Cir. 1985) ("[O]ur deference and esteem for the institution [of Congress] as a whole and for the constitutional command that the institution be allowed to manage its own affairs precludes us from even attempting a diagnosis of the problem."); *Moore*, 733 F.2d at 958 (Scalia, J., concurring) (courts may not "set[] [them]selves up as arbiters of [an] internal dispute" in the House); *Metzenbaum v. FERC*, 675 F.2d 1282, 1287 (D.C. Cir. 1982) (*per curiam*) ("To resolve this issue would require us not only to construe the rules of the House of Representatives but additionally to impose upon the House our interpretation of its rules.").

Indeed, it is hard to imagine a more compelling example of this point than this case. Here, a Member of Congress filed a complaint with the House Ethics Committee charging Rep. McDermott with having violated a number of duties, including his nondisclosure duties to the House Ethics Committee, by disclosing the Martins' tape. The Ethics Committee, however, specifically declined even to *charge* Rep. McDermott with violating any law, rule, regulation, or other standard of conduct. Instead, the Committee issued a Report ending the matter without imposing any sanction whatsoever (or even proceeding to an adjudicatory phase), but including some language disapproving of Rep. McDermott's conduct. *See* App. 142a (concluding that "Representative McDermott's conduct ... was inconsistent with the *spirit* of the applicable rules and represented a failure on his

part to meet his *obligations as Ranking Minority Member* of the House Select Committee on Ethics") (emphasis added).

The marked contrast between the careful language of the Ethics Committee Report and the *en banc* majority's characterization of that Report, *see* App. 12-13a, only highlights the dangers inherent in judicial efforts to interpret and apply internal legislative rules. The Committee's reference to the "spirit" of the Rules would be inexplicable if the Committee had concluded that Rep. McDermott violated the *letter* of the Rules, and the reference to his "obligations as Ranking Minority Member" cannot possibly refer to Rule 9, since that Rule's nondisclosure duty applied to all Committee Members, not just the Ranking Minority Member. If the Committee meant to find that Rep. McDermott violated his nondisclosure duty under Rule 9, in short, it hardly could have chosen a more opaque way of saying so—and indeed could not have done so under its own procedures without referring the matter to an Adjudicatory Subcommittee (and allowing Rep. McDermott to defend himself). Rather than an adjudication of a Rule violation, the Report thus reflects a classic political compromise by allowing all sides to claim some, but not complete, vindication.[2]

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[2] The Ethics Committee's conspicuous refusal to conclude that Rep. McDermott violated the nondisclosure duty in Rule 9 is not surprising. At the time relevant here, that Rule provided that "Committee members and staff shall not disclose [1] any *evidence* relating to an investigation [2] to any person or organization *outside* the Committee unless authorized by the Committee." Rule 9, Rules of the Committee on Standards of Official Conduct, U.S. House of Representatives, 104th Congress (1995-96) (emphasis added). As Judge Sentelle explained, it is—to say the least—far from clear that Rep. McDermott violated the Rule for two reasons. *First*, the tape at issue here was not "evidence" in the Gingrich investigation; rather, the tape contained a conversation that took place *after*

The D.C. Circuit *en banc* majority, however, seized upon the Report as the predicate for its conclusion that Rep. McDermott violated the nondisclosure duty in Rule 9, which in turn served as the predicate for the court's conclusion that § 2511(1)(c) could constitutionally be applied here notwithstanding *Bartnicki*. *See* App. 12-13a; *see also id.* at 14a (Griffith, J., concurring). For all intents and purposes, the *en banc* majority not only implied a private right of action to enforce the House Ethics Committee rules, but also held that the Report clearly says what it carefully refrained from saying. *See* App. 13a ("We agree with and accept the Ethics Committee's interpretation of the Rules as applied to this case."). By barreling past the point where the Ethics Committee itself refused to go, however, the *en banc* majority effectively overturned the Committee's careful political

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the investigation to discuss a political *response* to the investigation. *See* App. 29a (Sentelle, J., dissenting). *Second*, the Rule's prohibition on the disclosure of information "outside" the Committee presupposes that the information was received from "inside" the Committee in the first place. Here, Rep. McDermott did not disclose *internal* Committee information; he simply disclosed a tape recording of a conversation among persons outside the Committee received unsolicited from other persons outside the Committee. *See id.* The courts simply have no business resolving such ambiguities in internal legislative rules—especially where, as here, Congress itself has declined to resolve them. *See, e.g., United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995) ("[J]udicial interpretation of an ambiguous House Rule runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution."); *id.* at 1312 ("[T]he Judiciary [may not] resolve against a Member of Congress an ambiguity in the Rules by which the Legislature governs itself, if reason allows otherwise."); *id.* ("If there can be a reasonable doubt about whether ... a Member ... violat[ed] ... a House Rule, then the court cannot presume to interpret the rule.").

compromise—not only awarding victory where the Committee itself declined to do so, but compromising its own independence by appearing to choose sides in an internal Legislative dispute.

These are precisely the dangers that led the Framers to include the Rulemaking Clause in the Constitution. It is hard to overstate the D.C. Circuit majority's affront to the separation of powers. If an obvious political compromise like the one reflected in the Ethics Committee Report at issue here may nonetheless trigger adverse collateral consequences beyond the legislative sphere, such compromise will become impossible. Unless this Court grants review, Rep. Boehner and his political allies will have garnered in court the very victory that eluded them in the Ethics Committee. This Court should not allow the lower federal courts thus to become pawns of different political factions in Congress. If ever a case warranted definitive resolution at long last by the Supreme Court of the United States, it is this one.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

FRANK CICERO, JR., P.C.
KIRKLAND & ELLIS LLP
200 East Randolph Dr.
Chicago, IL 60601

CHRISTOPHER LANDAU, P.C.
Counsel of Record
EDWIN JOHN U
PADRAIC B. FENNELLY
KIRKLAND & ELLIS LLP
655 Fifteenth St., N.W.
Washington, DC 20005
(202) 879-5000

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